



231699  
Eric M. Hocky  
Direct: Dial 215 640 8523  
Email ehocky@thorpreed.com

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Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street SW  
Washington, DC 20024

January 17, 2012

Re: SMS Rail Service, Inc. –  
Adverse Discontinuance of Service Exemption  
– Gloucester County, NJ  
STB Docket No. AB 1095X

Dear Ms. Brown:

*Preliminary Matters*

On January 10, 2012, Paulsboro Refining Company LLC (“PRC”) filed a Petition for Adverse Discontinuance of Service Exemption (“Petition”). SMS Rail Services, Inc. (“SMS”) has now filed three letters in response. Its initial letter filed on January 10, 2012 requested rejection of the Petition based on alleged deficiencies in the filing relating to the Board’s regulatory requirements, including an alleged failure to properly serve SMS. The next day, SMS acknowledged that in fact service had been properly made, and PRC filed a response refuting the other alleged deficiencies. On January 12, 2010, SMS then filed a second request that the Petition be rejected as an improper procedure for seeking discontinuance authority.

PRC believes that the Board’s regulations contemplate that only a single reply or motion can be filed in response to a pleading (*see* 49 CFR §1104.13(a)), and accordingly, SMS should not be permitted to file a series of letters/motions asking for relief on a series of different grounds, and the January 12 letter should be stricken. Alternatively, the January 12 letter should be stricken as an impermissible reply to a reply under 49 CFR §1104.14(c). If the Board accepts the January 12 letter for consideration, then the Board should also accept the reply set forth below.

*Reply to January 12 letter*

PRC acknowledges that in the past the Board has indicated that its practice in “adverse” abandonment and discontinuance proceedings is to require that an application be filed. *Southern Pacific Rail Corporation – Abandonment Exemption – In Garfield, Eagle and Pitkin Counties, CO*, STB docket No. AB-12 (Sub-No. 190X) (served June 10, 1996). However, neither the exemption statute nor the Board’s regulations prohibit the use of an individual petition for exemption, or require the use of an application.

Pittsburgh

Philadelphia

Washington

Wilmington

Portland

Thorpe Reed & Armstrong LLP  
One Commerce Square  
2005 Market Street  
Suite 1000  
Philadelphia, PA 19103-7041  
215 640 8523  
215 640 8523 Fax

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PRC filed its Petition seeking an exemption under 49 USC §10502 and 49 CFR 1152.60 from the requirements of 49 USC 10903 to allow the “adverse” discontinuance of service by SMS over the tracks owned by PRC at PRC’s Paulsboro, New Jersey refinery. PRC would have its necessary switching services performed by a private contractor, and service to shippers would not be affected. Except for specific limitations set forth in the statute (none of which are applicable here), Section 10502 requires the Board to exempt any “matter related to a rail carrier” when the stated criteria are met. There is nothing in the statute that limits exemptions to those requested by rail carriers. Similarly, the Board’s regulations for individual petitions relating to abandonments and discontinuances, 49 CFR 1152.60, *et seq.*, state nothing about being limited to petitions filed by rail carriers.<sup>1</sup>

SMS cites in its January 12 letter, an article written by its counsel (although in his individual capacity and not as counsel for SMS), in which it is argued:

There, however, is nothing in the ICC Termination Act of 1995 or in the Board’s implementing regulations that would support the differentiation between operating railroads and other persons when seeking the Board’s authorization to abandon or to discontinue serving a line of railroad.

Fritz R. Kahn, “Discontinue Adverse Abandonments,” *Journal of Transportation Law, Logistics and Policy*, No. 1, First Qtr. 2011, at 61. *See also* Comments of Transportation Arbitration and Mediation, PLLC filed in Ex Parte 712 on January 10, 2012, at 7-8 (and cited by SMS).

In the *Southern Pacific*, *supra* case cited by SMS as the basis for the Board’s practice, landowners with reversionary interests filed a *notice of exemption* under the Board’s two year out of service exemption regulations. The decision of the Board affirmed the decision of the Director rejecting the notice on that the subject regulations reflect “a *class exemption* which may only be used by the railroad ... that operates the line proposed to be discontinued.” *Southern Pacific*, *supra* at 2 (emphasis added). On appeal, the landowners argued that the Board should modify its regulations and broaden the class exemption regulations to allow adverse filings by adjoining landowners. The Board affirmed that exemption procedures should not be used in discontinuance matters as they would impose an additional burden on the railroad to defend against the discontinuance of a line. *Id.* This discussion in *Southern Pacific* should be limited to the context of that proceeding – parties seeking adverse abandonment or discontinuance authority should not be permitted to use the *class exemption* procedures at 49 CFR 1150.1 *et seq.*, as those

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<sup>1</sup> There is also nothing in the general petition for exemption regulations at 49 CFR 1121 that would indicate that petitions can only be filed by rail carriers.

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procedures were adopted to allow rail carriers an expedited way to abandon or discontinue where shippers would not be affected; and as the use of the class exemption procedures would have required a change and expansion of the scope of the existing regulations, and would not have permitted responses and objections (other than seeking a stay of the effective date) as part of the established procedures.

On the other hand, as discussed above, the individual petition procedures are not restricted to use by rail carriers and their use for an adverse discontinuance does not require any change in the regulations. Further, individual petitions, like applications, provide the rail carrier with an adequate opportunity to respond.<sup>2</sup> Finally, it should be noted that even if an adverse petition were granted, the rail carrier would not be forced to take any action. Rather, the Board's authorization would permit SMS to discontinue operations, or it would allow PRC to proceed to enforce its contract rights in state court. See Petition at 5-6; *Cheatham County Rail Authority – Application and Petition for Adverse Discontinuance*, ICC Finance Docket No. 32049 (renumbered ICC Docket No. AB-379X) (served November 4, 1992), at 7.

Although SMS argues that an adverse petition for discontinuance has never been allowed, the Interstate Commerce Commission in fact did permit the use of an "adverse petition" for discontinuance. See *Cheatham County Rail Authority*, *supra*, at 1 ("This decision grants an adverse petition seeking authority for discontinuance of a rail operator's service." Emphasis added.)

In situations like the one presented in this case where the owner of tracks/facility wants to replace the existing common carrier with alternate service in conjunction with the expiration or termination of the carrier's contract rights to operate, use of a petition for exemption is particularly appropriate. The detailed informational requirements of a full application relating to financial benefits and burdens, track condition, etc. are not relevant to the requested relief. Here there has been a termination of the operating agreement in accordance with the terms of the agreement, alternative service has been arranged, the relief has been requested by the owner/major shipper, and the only other shipper does not object to the change. If the Board needs additional information to make its determination, it can direct that additional information be filed by the parties. 49 CFR 1121.4(c)(i).<sup>3</sup> If there is a dispute over whether the operating agreement was properly

<sup>2</sup> There is no reason "why the rail carrier's protest needs to be expressed in the context of an abandonment or discontinuance application proceeding cannot be articulated as well in opposition to a petition for exempt abandonment or discontinuance." "Discontinue Adverse Abandonments," *supra* at 61.

<sup>3</sup> If the Board were still unable to make a determination, it could at that point require a full application.

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terminated, that will be decided in state court following the Board determination. PRC should not be required to incur the added cost and expense, and delay, that would result if it were to proceed by application. This is exactly the type of situation that the exemption procedures were designed to address.

For all of the foregoing reasons, the Board should not reject the Petition and should proceed to with its processing.

Respectfully,



Eric M. Hocky

*Counsel for Paulsboro Refining  
Company LLC*

EMH/e  
Enclosure

cc (by email): Fritz Kahn

cc (by mail): All persons on the attached list

Jonathan Broder  
Conrail  
1717 Arch Street, 32<sup>nd</sup> Floor  
Philadelphia, PA 19103

E.M. Fitzsimmons  
Nathan Goldman  
CSX Transportation, Inc.  
Law Department  
500 Water Street, J150  
Jacksonville, FL 32202

James A. Hixon  
William A. Galanko  
Norfolk Southern Railway Company  
Three Commercial Place  
Norfolk VA 23510

Michael A. Carrocino, Facility Manager  
ExxonMobil Research & Engineering Company  
600 Billingsport Road  
Paulsboro, NJ 08066

New Jersey Department of Transportation  
Bureau of Rail Services  
1035 Parkway Avenue  
Trenton, NJ 08525-0600

Office of Chief of Forest Service  
U.S. Department of Agriculture  
1400 Independence Avenue, SW  
Washington, DC 20250

United States Department of the Army  
Military Surface Deployment & Distribution Command  
Transportation Engineering Agency  
ATTN: SDTE-SA (Railroads for National  
Defense Program)  
1 Solider Way, building 1900W  
Scott AFB, IL 62225-5006

U.S. Department of the Interior  
National Park Service  
RTCA Program (Org Code 2240)  
1849 C Street, NW  
Washington, DC 20240